U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date Issued: July 8, 1999

Case No.: 1999-INA-0128

In the Matter of:

BRADLEE FLORIST,
Employer,

on behalf of

ALIYAH N. ALI,
Alien.

Appearance: Michael E. K. Moras, Esq.
Certifying Officer: Richard Panati, Region III

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This application was filed on May 5, 1997, by Bradlee Florist for the position of Floral Designer, seeking labor certification for Aliyah N. Ali, Alien (AF 15). The duties of the job were described as follows:

> Designs and fashions live, cut, dried, and artificial floral and foliar arrangements for events, such as holidays, anniversaries, weddings, balls and funerals. Confers with client regarding price and type of arrangement desired. Plans arrangement according to client's requirements and costs, utilizing knowledge of design and properties of materials, or selects appropriate standard design pattern.

Employer required that applicants have two years of experience in the job offered or two years of experience as a Floral Designer Assistant. In addition, Employer required that applicants have good references and a willingness to work overtime.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on October 15, 1998 (AF 11-12). The CO stated that it does not appear that the Alien possessed two years of experience as a Floral Designer or as an Floral Designer Assistant at the time of hire and that the Alien gained the required two years of experience as a Floral Designer while working for Employer in violation 20 C.F.R. § 656.21(b)(5). The CO stated that Employer could rebut this finding by submitting evidence that clearly shows that the Alien, at the time of hire, had the qualifications now required; or that the Alien gained the required experience working for Employer in other jobs which were not similar to the job for which labor certification is sought; or that it is not presently feasible due to business necessity to hire a worker with less than the qualifications presently required for the job and that the job as currently described existed before the Alien was hired. In the alternative, Employer was advised that it could delete the requirement and re-advertise the job.

Employer, by counsel, filed rebuttal on November 2, 1998 (AF 7-10). Rebuttal consisted of an amended Form ETA 750, Part B, Item 15 which had been amended to reflect previous employment as an Assistant Floral Designer with Bud's Bloom Flower Shop from 1/94 to 6/94 and from 12/94 to 7/95 (AF 8).

The CO issued a Final Determination denying certification on December 11, 1998 (AF 5-6). The CO stated that the NOF did not give the option of amending the dates of the Alien's

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

previous employment on the application; it required that Employer submit evidence that the Alien had the experience now required when initially hired; that amending the ETA 750 Form does not constitute evidence.

Employer filed a motion for reconsideration that was denied by the CO on January 20, 1999 and the case was referred to this office for review.

DISCUSSION

The issue is whether the Employer's requirements for the job opportunity are Employer's actual minimum requirements.

Twenty C.F.R. § 656.21(b)(5) provides that "[t]he Employer shall document that its requirements for the job opportunity, as described, represent its actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer." See: *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992) This Board has considered the employer's burden of proof under § 656.21(b)(5) to be a substantial burden. U.S. workers should not have to face more stringent qualification for a job opportunity than are required of an Alien worker. Moreover, preferential treatment in the form of training in a similar job should not be given to an alien worker, but denied to a U.S. worker. *ERF Inc., d/b/a Bayside Mortor Inn*, 89-INA-105 (Feb. 14, 1990) Since § 656.21(b)(5) proscribes as preferential only that job training given the alien worker in jobs "similar" to the job for which labor certification is sought, training given in a "dissimilar" job is not considered to be preferential on-the-job training for the job opportunity being certified. *Brent-Wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989) (*en banc*). The factors relevant to a determination of whether the two jobs are sufficiently "dissimilar" are varied. *Delitizer Corp. of Newton*, 88-INA-482 (May 9, 1990) (*en banc*).

The CO stated in the NOF that the Alien lacked the required two years of experience as a Floral Designer Assistant at the time Employer hired her and that it appeared that the Alien gained the required two years of experience as a Floral Designer while working for Employer. The record indicates that the Alien had 14 months of experience as a Floral Designer Assistant at the time she was hired by Employer; that she worked for Employer for 16 months as a Floral Designer Assistant and then began working as a Floral Designer.

The NOF questioned the extent and source of the Alien's qualifying experience and directed Employer to "[s]ubmit evidence that the alien gained the required experience working for the Employer in jobs which were not similar to the job for which labor certification is sought" (AF 12). In addition, the NOF directed Employer to document that the job existed prior to the Alien's hire and that it was filled using the same job duties and requirements; or if the job did not previously exist, them Employer was to document that a major change in business operation caused the job to be created. The NOF specified the type of documentation that Employer must provide position descriptions, organizational charts, payroll records, and resumes of former incumbents (AF 12).

According to the record, the Alien's job duties when first hired by Employer in 1995 included "cleaning flowers, preparing the flowers for cutting, administering flower food, washing the flower buckets and coolers (and) [a]ssists in sales and general store upkeep" (AF 18). While these duties appear to be only somewhat similar to the duties of the offered job, both jobs involve handling flowers and dealing with customers in a flower shop.

Despite the CO's instructions in the NOF, Employer did not attempt to establish that the Alien had not obtained qualifying training as a Floral Designer while working for Employer or that the job existed before the Alien was hired. In fact, Employer provided none of the documentation requested by the CO in the NOF. This Board has held that an Employer must provide relevant information requested by the CO. *Glencorp*, 87-INA-659 (Jan. 13, 1988) *(en banc*). Submitting only an amended Form 750 in rebuttal was not responsive to the NOF and did not rebut the findings in the NOF. Employer's failure to provide the requested documentation or to even present an explanation or argument in response to the NOF supports the denial of labor certification.[2] Employer's rebuttal was inadequate to carry its burden of proof.

ORDER

The Certifying Officer's denial of certification is **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

[2] We have held in *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. The employer here did not indicate that applicants with any suitable combination of education, training or experience are acceptable. Therefore, even if the Alien had met the employer's alternative requirements, they would have been unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5).

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.